# STATE OF MICHIGAN

# IN THE SUPREME COURT

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff—Appellant,

vs.

Supreme Court No. 152448
Court of Appeals No. 317892
Circuit Court No. 10-2936-FC

**TIA MARIE-MITCHELL SKINNER,**

Defendant—Appellee.
_____/

## PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

Hilary B. Georgia (P66226)
Senior Assistant Prosecuting Attorney
201 McMorran Blvd., Room 3300
Port Huron, MI 48060
Direct Telephone: (810) 985-2414
Fax: (810) 985-2424
Email: hgeorgia@stclaircounty.org

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

### U.S. Supreme Court Cases



### Michigan Cases



### Statutes



### Constitutional Provisions

## JURISDICTIONAL STATEMENT

This Court's jurisdiction is specified in MCR 7.303(B)(1), which provides that the Supreme Court may review by appeal a case pending in the Court of Appeals or after decision by the Court of Appeals. The Court of Appeals issued its Opinion in *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015) on August 20, 2015. The People filed a timely Application for Leave to Appeal pursuant to MCR 7.305(C)(2). This Court granted leave to appeal in an Order dated January 24, 2017.

## STATEMENT OF QUESTION INVOLVED

**I. Is the Sixth Amendment violated when a person under the age of 18 is sentenced by a judge to a prison term of life without parole under MCL 769.25 without any further findings of a jury beyond the verdict of guilt?**

The trial court answered: NO
The Court of Appeals answered: YES
The Plaintiff-Appellant answers: NO
The Defendant-Appellee answers: YES

## STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

On August 16, 2011, the Defendant-Appellee, Tia Skinner, was convicted by jury of first-degree premeditated murder, contrary to MCL 750.316 (1)(a); assault with intent to murder, contrary to MCL 750.91; and conspiracy to commit murder, contrary to MCL 750.316. These convictions arose out of the plan made by the Defendant and her two codefendants, James Preston and Johnathan Kurtz, to kill her parents, Paul and Mara Skinner. Mr. Kurtz was the Defendant's boyfriend, a relationship of which the Skinners did not approve.

The Defendant was seventeen years old on the date of the crime, November 12, 2010. She was just 26 days shy of her eighteenth birthday on the night the attack that she planned was carried out. The entirety of the evidence and testimony admitted at trial need not be set forth here, as the issue before this Court pertains to her sentencing only. A summary of the relevant facts is included for context and background.

Mr. Preston and Mr. Kurtz delivered the stab wounds to Paul and Mara Skinner; however, the Defendant initiated the murder plan, and facilitated the attack on her parents in several ways. She drew a map of her house.[1] She prepared a note with tips on how to enter the home and avoid the dogs.[2] On the night the plan was to be executed, the Defendant insisted that her brother Jeff watch a movie

[1] Trial Transcript, p. 826-827; Plaintiff-Appellant's Appendix, p. 76A-77A
[2] Trial Transcript, p. 769, 774-775; Plaintiff-Appellant's Appendix, p. 57A; 62A-63A

with her in the basement as her parents slept upstairs. This enabled her co-defendants to enter the home without detection.[3]

Paul and Mara Skinner were attacked in their bed as they slept.[4] Mara awoke to the sound of Paul screaming and realized she was being stabbed. Paul Skinner fought for his life—and for Mara's life—during the attack.[5] His injuries were so severe that when Jeff tried to render aid, he observed that Paul's intestines were extruding from his body.[6] Paul had 23 sharp force injuries as well as blunt force injuries that resulted in his death.[7] Mara Skinner suffered 26 different stab wounds on her head, face, and upper body.[8] Her treating physician testified that he had never seen someone with so many wounds survive.[9]

When Jeff Skinner called to the Defendant for help, she did not come.[10] Despite the horror of the crime scene, when deputies arrived, the Defendant was observed as calm and nonchalant, asking no questions about what had happened.[11] She asked no questions of responding officers about the condition of her parents.[12] Upon initial interview by police, the Defendant maintained she had no knowledge of how the crime occurred.[13] Later, she led investigators to believe Kurtz and Preston

[3] Trial Transcript, p. 350-352; Plaintiff-Appellant's Appendix, p. 19A-21A
[4] Trial Transcript, p. 261-262; Plaintiff-Appellant's Appendix, p. 3A-4A
[5] Trial Transcript, p. 264; Plaintiff-Appellant's Appendix, p. 6A
[6] Trial Transcript, p. 357-359; Plaintiff-Appellant's Appendix, p. 26A-28A
[7] Trial Transcript, p. 550-561; Plaintiff-Appellant's Appendix, p. 43A-54A
[8] Trial Transcript, p. 272-276; Plaintiff-Appellant's Appendix, p. 14A-18A
[9] Trial Transcript, p. 538; Plaintiff-Appellant's Appendix, p. 42A
[10] Trial Transcript, p. 365-367; Plaintiff-Appellant's Appendix, p. 34A-36A
[11] Trial Transcript, p. 430-431; Plaintiff-Appellant's Appendix, p. 37A-38A
[12] Trial Transcript, p. 469; Plaintiff-Appellant's Appendix, p. 39A
[13] Trial Transcript, p. 814; Plaintiff-Appellant's Appendix, p. 64A

had committed the crime, but did not implicate herself.[14] She subsequently acknowledged her role, but claimed she had not really wanted it to happen.[15]

Texts exchanged among the Defendant and her codefendants as they planned the attack were presented during trial.[16] The Defendant told Kurtz that she hoped everything went well and that she wanted to know what they would be using as a murder weapon so that she would "know how to set everything up in our house."[17] The Defendant later advised Kurtz that she was trying to figure out where her house creaks. She also texted that she was not nervous about the plan anymore because "it needs to be done."[18] She texted directions to Kurtz to do it at 11 p.m., and stated that she could not wait for the next day when the plan was to take place.[19]

Separate juries convicted all three codefendants, and the Defendant was sentenced for the first time on September 16, 2011, to mandatory life without parole for the murder of her father. She was also sentenced to life for the attempted murder of her mother, which exceeded guidelines. While the Defendant's case was pending on direct appeal, the U.S. Supreme Court decided *Miller v Alabama*, 567 US __ ; 132 S Ct 2455; 183 L Ed 2d 407 (2012), making the Defendant's sentence unconstitutional because it was imposed mandatorily. In light of *Miller*, and *People*

[14] Trial Transcript, p. 818, 821; Plaintiff-Appellant's Appendix, p. 68A, 71A
[15] Trial Transcript, p. 832; Plaintiff-Appellant's Appendix, p. 82A
[16] Trial Transcript, p. 988-1008; Plaintiff-Appellant's Appendix, p. 85A-105A
[17] Trial Transcript, p. 989-990; Plaintiff-Appellant's Appendix, p. 86A-87A
[18] Trial Transcript, p. 996; Plaintiff-Appellant's Appendix, p. 93A
[19] Trial Transcript, p. 996-997; Plaintiff-Appellant's Appendix, p. 93A-94A

*v Carp*, 298 Mich App 472; 828 NW2d 685 (2012), the case was remanded to the trial court for resentencing on the first degree murder count.

The trial court addressed the *Miller* factors at the second sentencing on July 11, 2013. The Defendant told the trial court that she was sorry, but that she didn't deserve to spend the rest of her life in prison.[20] The court permitted statements from Ken Skinner and Jeff Borja (representatives from the victims' family), as well as the trial prosecutor. At the conclusion of the hearing, the trial court again imposed a sentence of life without parole.[21]

The Defendant appealed her sentence after remand, alleging ineffective assistance of counsel; error of the trial court; and that her sentence violated the Michigan Constitution's prohibition against cruel or unusual punishments. Because MCL 769.25 had been enacted in the meantime, the Court of Appeals remanded the case for a third sentencing without reaching the merits of the other claims. The Court directed that any information that should have been presented at the previous sentencing hearing could be offered on remand.[22]

On September 18, 2014, the trial court began the first day of a two-day sentencing hearing pursuant to MCL 769.25(6) to consider the *Miller* factors. As the specific testimony considered by the trial court is not necessary for the strictly legal question presented in this appeal, it will not be detailed here, except as to summarize the witnesses presented. The court heard testimony from Mara

[20] Sentencing Hearing, dated 7/11/13, p. 10-11; Plaintiff-Appellant's Appendix, p. 159A-160A
[21] Sentencing Hearing, dated 7/11/13, p. 33; Plaintiff-Appellant's Appendix, p. 182A
[22] Court of Appeals Order, dated 7/30/14; Plaintiff-Appellant's Appendix, p. 185A

Skinner, Jeff Skinner, and two of the Defendant's uncles, Marcel and Jeff Borja. The Defendant's attorneys called her biological mother, Valerie Borja-Crabtree; Yolanda Jones, who worked with her in the prison; and two experts, Dr. Carol Holden and Dr. James Garbarino. The Defendant also testified. The trial court considered a binder full of documents provided by the Defendant's team of attorneys. At the conclusion of the testimony, Judge Kelly advised the parties that he would like to consider all the information presented and that he would announce his sentence the following week.[23] On September 24, 2014, the parties reconvened, at which time the court imposed a sentence of life without parole.[24]

The Defendant appealed again, alleging among other issues not involved here, that she was entitled to a jury determination of her sentence of life without parole. In an Opinion issued August 20, 2015, the Court of Appeals agreed that a jury was required, and found that the Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a sentence of life without parole have a right to have their sentence determined by a jury. *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015). Judge Sawyer dissented, stating that the majority opinion fundamentally misread the statute, and that the issue of whether a juvenile is sentenced to life without parole is not required to be submitted to a

[23] Sentencing Transcript, dated 9/19/14, p. 394, 424; Plaintiff-Appellant's Appendix, p. 594A, 624A
[24] The Appellant agreed to appear via video because a writ was not prepared by her attorneys. (Disposition Transcript, dated 9/24/14, p. 3; Plaintiff-Appellant's Appendix, p. 627A)

jury. *Skinner*, at 72 (Sawyer, J., dissenting). The People filed their Application for Leave to Appeal to this Court, which was granted on January 24, 2017.[25]

Following the *Skinner* decision, the Court of Appeals was again faced with the issue of whether a jury must be impaneled to sentence a juvenile to life without parole in *People v Hyatt*, 316 Mich App 368; __ NW2d __ (2016). There, the Court of Appeals declared a conflict with *Skinner* under MCR 7.215(J)(2), stating that the majority Opinion of the Court of Appeals in *Skinner* was wrongly decided, and adopting Judge Sawyer's dissent. The Court of Appeals found in *Hyatt* that a judge, not a jury, must determine whether to impose a life without parole sentence, or a term of years sentence, under MCL § 769.25. This Court also granted oral argument on the Application in *Hyatt* on January 24, 2017, to be heard on the same date as oral argument in this case.[26]

[25] Order, dated January 24, 2017; Plaintiff-Appellant's Appendix, p. 694A
[26] Order, dated January 24, 2017; Plaintiff-Appellant's Appendix, p. 694A

## INTRODUCTION

Judicial discretion has long been exercised in imposing sentence within a statutory range without violating the Sixth Amendment. In the context of sentencing juveniles who have been convicted of first-degree murder, it remains constitutionally permissible for judges to consider facts related to both the defendant and the circumstances of the crime to arrive at an individualized, proportionate sentence within range of sentencing options. No jury is required to perform this function under MCL 769.25.

The decision of the Court of Appeals in *People v Skinner*, 312 Mich App 15; 877 NW2d 482 (2015), which found that a jury must be impaneled to decide whether a juvenile may be sentenced to life without parole, is erroneous. MCL 769.25 and the jury's finding of guilt in a first-degree murder case authorize the sentencing judge to impose a life without parole sentence without additional fact-finding, and the language of the statute does not entitle a juvenile to a term of years sentence. The *Miller* decision does not require this type of jury proceeding, nor does any of the United States Supreme Court cases relied on by the majority in its determination that MCL 769.25 violates the Sixth Amendment. All of those cases involve situations where the sentence ultimately imposed was greater than what the legislature authorized based on the conviction alone. In enacting MCL 769.25, the Legislature did not intend, and did not provide any procedure for, jury determinations of sentences in these cases. For all of these reasons, more fully discussed below, the *Skinner* decision should be reversed.

## ARGUMENT

### I. The Sixth Amendment is not violated when a person under the age of 18 is sentenced by a judge to a prison term of life without parole under MCL 769.25 without any further findings of a jury beyond the verdict of guilt.

#### A. Standard of Review

Whether the Defendant is entitled to a jury determination before the trial court can impose a sentence of life without parole for a first-degree murder conviction is a question of constitutional law that is subject to de novo review. *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

#### B. Analysis

There is no Sixth Amendment violation where a trial judge sentences a juvenile defendant convicted of first degree murder to life without parole after a hearing as provided for in MCL 769.25. Contrary to the assertions of the Defendant both here and in the Court of Appeals, neither the Sixth Amendment nor the United States Court precedent extending it to the sentencing process requires a jury to be impaneled to make a determination as to the juvenile's sentence.

##### 1. The Sixth Amendment and *Apprendi*

The Sixth Amendment of the United States Constitution requires that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed…" US Const Am VI. The Sixth Amendment entitles a criminal defendant to a jury determination that he or she is guilty of every element of the

crime with which he or she is charged, beyond a reasonable doubt. *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

In *Apprendi*, the U.S. Supreme Court addressed the scope of Sixth Amendment rights in the context of sentencing. The Court found that where "a defendant faces punishment *beyond that provided by a statute* when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached." *Apprendi*, at 484 (Emphasis added). Essentially, *Apprendi* requires jury findings when a punishment is imposed outside or beyond what the statute authorizes. The *Apprendi* Court emphasized that judicial discretion is properly exercised in imposing a sentence within the permissible statutory range:

> We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in *imposing a judgment within the range prescribed by statute*. We have often noted that judges in this country have long exercised discretion of this nature in *imposing sentence within statutory limits* in the individual case. [*Apprendi*, at 481.(Emphasis added).]

**2. *Miller*, *Montgomery*, and MCL 769.25**

In *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the United States Supreme Court held that a mandatory sentence of life in prison without parole for a juvenile violated the Eighth Amendment's prohibition of cruel and unusual punishment. The Court found that "such a scheme poses too great a risk of disproportionate punishment" because it does not allow a sentencer to consider mitigating factors associated with the qualities of youth. *Miller*, at 2467.

These mitigating factors include: the character and record of the individual offender and the circumstances of the offense; the chronological age of the minor; the background and mental and emotional development of a youthful defendant; the family and home environment; the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected the juvenile; whether the juvenile might have been charged and convicted of a lesser offense if not for incompetencies associated with youth; and the potential for rehabilitation. *Miller*, at 2467-68.

In finding that the mandatory imposition of life without parole sentences for juveniles was unconstitutional, the Court recognized that life imprisonment may be appropriate in some cases, requiring sentencing courts to first "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller*, at 2469. The *Miller* decision did not categorically bar sentences of life in prison without parole for juveniles. Instead, *Miller* "mandates only that a sentence follow a certain process—

considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.* at 2471.

In response to the mandate in *Miller*, the Legislature enacted MCL 769.25 to provide a sentencing process for prosecutors, defendants, and trial courts. This statute provides:

> (1) This section applies to a criminal defendant who was less than 18 years of age at the time he or she committed an offense described in subsection (2) if either of the following circumstances exists:
>
> (a) The defendant is convicted of the offense on or after the effective date of the amendatory act that added this section.
>
> (b) The defendant was convicted of the offense before the effective date of the amendatory act that added this section and either of the following applies:
>
> (i) The case is still pending in the trial court or the applicable time periods for direct appellate review by state or federal courts have not expired.
>
> (ii) On June 25, 2012 the case was pending in the trial court or the applicable time periods for direct appellate review by state or federal courts had not expired.
>
> (2) The prosecuting attorney may file a motion under this section to sentence a defendant described in subsection (1) to imprisonment for life without the possibility of parole if the individual is or was convicted of any of the following violations:
>
> (a) A violation of section 17764(7) of the public health code, 1978 PA 368, MCL 333.17764.

(b) A violation of section 16(5), 18(7), 316, 436(2)(e), or 543f of the Michigan penal code, 1931 PA 328, MCL 750.16, 750.18, 750.316, 750.436, and 750.543f.

(c) A violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a.

(d) Any violation of law involving the death of another person for which parole eligibility is expressly denied under state law.

(3) If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described in subsection (1)(a), the prosecuting attorney shall file the motion within 21 days after the defendant is convicted of that violation. If the prosecuting attorney intends to seek a sentence of imprisonment for life without the possibility of parole for a case described under subsection (1)(b), the prosecuting attorney shall file the motion within 90 days after the effective date of the amendatory act that added this section. The motion shall specify the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole.

(4) If the prosecuting attorney does not file a motion under subsection (3) within the time periods provided for in that subsection, the court shall sentence the defendant to a term of years as provided in subsection (9).

(5) If the prosecuting attorney files a motion under subsection (2) requesting that the individual be sentenced to imprisonment for life without parole eligibility, the individual shall file a response to the prosecution's motion within 14 days after receiving notice of the motion.

(6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in Miller v Alabama, 576 US_____; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and may consider any other criteria relevant to its

> decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing.
>
> (8) Each victim shall be afforded the right under section 15 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.765, to appear before the court and make an oral impact statement at any sentencing or resentencing of the defendant under this section.
>
> (9) If the court decides not to sentence the individual to imprisonment for life without parole eligibility, the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years.
>
> (10) A defendant who is sentenced under this section shall be given credit for time already served but shall not receive any good time credits, special good time credits, disciplinary credits, or any other credits that reduce the defendant's minimum or maximum sentence. MCL 769.25.

To summarize, MCL 769.25 provides that the prosecutor may elect to seek a life without parole sentence, and if such an election is made, a motion must be filed specifying the grounds on which the prosecuting attorney is requesting the court to impose a sentence of imprisonment for life without the possibility of parole. The trial court then conducts a hearing on the motion as part of the sentencing process and considers the factors listed in *Miller*. The sentencing court may also consider any other criteria relevant to its decision, including the defendant's record while

incarcerated. The court must specify all aggravating and mitigating circumstances on the record and its reasons for the sentence imposed. If the prosecutor does not seek life without parole, the court shall sentence the defendant to a term of years sentence, with a minimum to be set by the court between 25 and 40 years and a maximum of 60 years. Notably, there is nothing in MCL 769.25 that requires the finding of a particular fact before a court can impose life without parole. Once the timely motion is filed seeking the penalty, the sentencing court may conduct a hearing and may choose either a term of years, or life without parole.

Following the enactment of MCL 769.25, the United States Supreme Court found that holding of *Miller* was to be applied retroactively. *Montgomery v Louisiana*, 577 US ___ ; 135 S Ct 718; 193 L Ed 2d 599 (2016). In addition to addressing the retroactivity question, the Court emphasized that life without parole is an excessive sentence for children whose crimes reflect transient immaturity. *Id.*, at 735. The Court also acknowledged that *Miller* did not require trial courts to make findings of fact regarding incorrigibility, only that states must develop procedures for courts to apply *Miller*'s requirement of individualized sentencing:

> Louisiana suggests that *Miller* cannot have made a constitutional distinction between children whose crimes reflect transient immaturity and those whose crimes reflect irreparable corruption because *Miller did not require trial courts to make a finding of fact regarding a child's incorrigibility. That this finding is not required, however, speaks only to the degree of procedure Miller mandated in order to implement its substantive guarantee.* When a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding

> more than necessary upon the States' sovereign administration of their criminal justice systems. See *Ford v. Wainwright*, 477 U.S. 399, 416–417, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences"). Fidelity to this important principle of federalism, however, should not be construed to demean the substantive character of the federal right at issue. *That Miller did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, Miller established that this punishment is disproportionate under the Eighth Amendment*. *Montgomery*, at 735 (Emphasis added).

**3. MCL 769.25 authorizes the sentencing judge to impose life without parole without any additional fact-finding.**

The sentencing hearings that *Miller* requires are intended to allow for consideration of individualized circumstances of the juvenile and his or her case, not to create an additional element to be found by a jury before a life without parole penalty may be imposed. Sentencing courts have always had the ability to choose from a range of punishments already prescribed by statute without necessitating a jury finding. This was reiterated by the United States Supreme Court in *Alleyne v United States*, __ US __; 133 S Ct 2151; 186 L Ed 2d 314 (2013). The *Alleyne* Court quoted the limits set forth in *Apprendi*, and further stated:

> In holding that the fact that increased mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today ***does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment***. *Id.*, at 2163. (Emphasis added)

The statutes at issue in *Apprendi* and *Alleyne* required the finding of specific facts by a jury *before* the punishments at issue could be imposed. MCL 769.25, however, does not provide specific facts that must be found prior to imposition of a sentence. Instead, the statute requires only that the court evaluate the considerations enumerated in *Miller*. The statute also permits, but does not require, the court to consider any additional relevant criteria beyond the *Miller* considerations. A judicial sentencing determination under MCL 769.25 involves the evaluation of an array of circumstances and considerations, but no "fact" must be found.

Because no additional fact must be found, MCL 769.25, when followed by the trial court, does not violate a defendant's Sixth Amendment right. In finding to the contrary, the Court of Appeals erred in *Skinner*:

> We hold that the Sixth Amendment mandates that juveniles convicted of homicide who face the possibility of a sentence of life without the possibility of parole have a right to have their sentence determined by a jury…In this case, defendant requested and was denied her right to have a jury decide her sentence. *Skinner*, at 20.

The majority in *Skinner* reasoned that MCL 769.25 makes an increase in a juvenile defendant's sentence contingent on factual findings, and therefore, those factual findings must be made by a jury beyond a reasonable doubt. Yet, MCL 769.25 does not require that any burden of proof be met or specific facts found, which further supports the conclusion that the statute does not require additional fact-finding. *See Skinner*, at 74 (Sawyer, J, dissenting). Rather, the trial court

must consider the circumstances of the individual defendant and make a decision as to whether life without parole is an appropriate sentence. The statute provides for sentencing considerations of aggravating and mitigating circumstances by the trial court:

> (6) If the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall ***consider the factors*** listed in *Miller v Alabama*, 576 US_____; 183 L Ed 2d 407; 132 S Ct 2455 (2012), and ***may consider any other criteria*** relevant to its decision, including the individual's record while incarcerated.
>
> (7) At the hearing under subsection (6), the court shall ***specify on the record the aggravating and mitigating circumstances considered*** by the court and the court's ***reasons supporting the sentence imposed***. The court may consider evidence presented at trial together with any evidence presented at the sentencing hearing. MCL 769.25 (Emphasis added).

Both *Miller* and MCL 769.25 require the Court to engage in an individualized *consideration* of all of the circumstances presented by both the prosecution and the Defendant, and reach a decision as to the appropriate sentence for the Defendant. The word "consider" does not equate to a factual finding necessitating a jury. Consider means "to think about carefully;" "to think about in order to arrive at a judgment or decision;" and "may suggest giving thought to in order to reach a suitable conclusion, opinion, or decision." See *Skinner*, at 75 (Sawyer, J, dissenting).

In *Hyatt*, the Court of Appeals correctly noted that MCL 769.25 allows the prosecutor to file a motion to sentence "up to the maximum that is allowed by the jury's verdict," and that the prosecutor's motion "is not meant to trigger a factual finding that will increase the maximum sentence; instead, the motion is filed to initiate the Eighth Amendment protections demanded by *Miller*." *Hyatt*, at 15.

The *Hyatt* decision also noted an important distinction between what the Sixth Amendment forbids and what it permits:

> As noted by the United States Supreme Court in *Rita v. United States*, 551 U.S. 338, 352, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007), "[t]his Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." Rather, "[t]he Sixth Amendment question" concerns "whether the law forbids a judge to increase a defendant's sentence unless the judge finds facts that the jury did not find (and the offender did not concede)." *Hyatt*, at 15.

**4. MCL 769.25 does not contain a "default provision," and does not entitle a juvenile to a term of years sentence.**

Although a term of years sentence has been referred to as the "default" sentence that must be imposed if the prosecutor does not file a motion seeking life without parole, the wording of MCL 769.25(9) demonstrates that where such a motion *is* filed, the term of years is not a default, but rather an range of options for the court if the court elects not to impose life without parole. MCL 769.25(9) reads: *If the court decides not to sentence the individual to imprisonment for life without parole* eligibility, the court shall sentence the individual to a term of imprisonment

for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years. (Emphasis added).

The majority in *Skinner* concluded erroneously that a term of years was the "default" because it equated maximum penalty with mandatory penalty. The maximum possible penalty under MCL 769.25 should not be confused with a mandatory penalty, yet this is exactly how the majority in *Skinner* arrived at the conclusion that juveniles were entitled to a term of years as a "default" sentence:

> The prosecution argues that MCL 769.25 does not expose defendant to an increased penalty because "[a]t the time of conviction, [defendant] faced the potential penalty of life without possibility of parole" and the "maximum allowable punishment is—at both the point of conviction and at sentencing—life without the possibility of parole." Similarly, the Attorney General, as amicus curiae, argues: "The statutory maximum penalty for first-degree murder—even for minors—is life without parole.... No facts are needed to authorize the sentence, beyond those contained in the jury's verdict." However, if, as the prosecution and the Attorney General contend, the "maximum allowable punishment" at the point of defendant's conviction is life without parole, then that sentence would offend the Constitution. Under *Miller*, a mandatory default sentence for juveniles cannot be life imprisonment without the possibility of parole. Such a sentence would not be an individualized sentence taking into account the factors enumerated in Miller. *Skinner*, at 49-50.

Nothing in MCL 769.25 leads to the conclusion that life imprisonment as a maximum penalty must be mandatorily imposed. To the contrary, the entire aim of MCL 769.25 is to provide for the *Miller* individualized sentencing inquiry. The

*Miller* factors as set forth in MCL 769.25 determine whether the judge should impose life without parole, not whether it can impose such a sentence.

The majority opinion states: "if as the state and the Attorney General contends, the 'maximum allowable punishment' is life without parole at the point of defendant's conviction, then that sentence would offend the constitution. Under *Miller* a mandatory default sentence for juveniles cannot be life imprisonment without the possibility of parole." *Skinner*, at 49. This is clearly error, because a maximum allowable punishment is not the same as a mandatorily imposed punishment. At the time of conviction, a sentence of life without parole is allowed, but not required, by MCL 769.25.

Recognizing that life without parole sentences will not be sought in every first-degree murder case committed by a juvenile, the Legislature provided a process to accommodate judicial economy and allocation of resources, so that a *Miller* hearing would not be required after all first-degree juvenile murder convictions, but only those where the prosecutor files a timely motion. The existence of this process does not create a default of term of years, however. Once the motion is filed, the defendant faces the possibility of life imprisonment without parole as a maximum sentence based on his or her conviction, standing alone without any additional factual findings. As Judge Sawyer's dissent in *Skinner* observed, the majority opinion characterizes the "default sentence" incorrectly:

> But the majority downplays the fact that this statement is made in the context of the fact that this "default

> sentencing range: is only applicable "absent a motion by the prosecutor seeking a sentence of life without parole" and that the trial court may impose a sentence of life without parole after such a motion is filed and conducting a hearing. The majority then performs an act of legalistic legerdemain and reinterprets *Carp* as follows: "Stated differently, at the point of conviction, absent a motion by the prosecution and *without additional findings* on the *Miller* factors, the maximum punishment that a trial court may impose upon a juvenile convicted of first-degree murder is a term-of-years sentence. If this statement were true, then I would agree with the majority that the question of life-without-parole must be submitted to the jury. But the statement is simply untrue. There are no additional findings which must be made in order for a defendant to be subjected to a sentence of life without parole. *Skinner*, at 72 (Sawyer, J, dissenting).

The conflict panel in *Hyatt* also recognized the error in the *Skinner* majority's "default sentence" characterization, noting that the reference in *People v Carp*, 496 Mich 440; 852 NW2d 801 (2014), to a default sentence was only used in describing the procedure for sentencing a juvenile in the absence of a motion filed by the prosecution in seeking life without parole. *Hyatt*, at 12, n 11.

The framework created by *Miller* and MCL 769.25 to sentence juveniles does not require the sentencing court to consider an offender's characteristics of youth in order to aggravate the available penalty. Instead, the individualized sentencing for juveniles ensures proportionality, and the court remains free under *Miller* to impose a life without parole sentence based on the jury's verdict alone. *See Hyatt*, at 12.

**5. United States Supreme Court precedent regarding the Sixth Amendment in sentencing does not require that a jury be empaneled before a juvenile convicted of first degree murder may be sentenced to life without parole.**

The Court of Appeals based its ultimate decision that juveniles convicted of murder are entitled to a jury determination before imposition of a life without parole sentence on the reasoning in a number of United States Supreme Court cases: *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002); *Blakely v Washington*, 542 US 961; 124 S Ct 2531; 159 L Ed 2d 403 (2004); and *Cunningham v California*, 549 US 270; 127 S Ct 856; 166 L Ed 2d 856 (2007). None of these cases supports the result reached by the majority.

***a. Apprendi v New Jersey***

The *Apprendi* decision, referenced above, makes two points clear: 1) defendants are entitled to jury determination when a punishment is imposed beyond what is statutorily authorized; and 2) judges can exercise discretion in imposing a sentence within a permissible statutory range. MCL 769.25 does not infringe on the rights extended in *Apprendi* because it does not "expose a criminal defendant to a penalty exceeding the maximum he or she would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, at 483. At the time of her conviction, the Defendant faced the potential penalty of life without possibility of parole. No additional element or specific fact was necessary, before or after MCL 769.25 was enacted, to expose her to this penalty. The majority opinion errs when it interprets *Apprendi* as requiring a jury determination when the

decision so clearly preserves judicial discretion in sentencing within a range of options.

The conflict panel in *Hyatt* correctly identified the distinction between the statute in *Apprendi* and MCL 769.25:

> In sum, when the prosecuting attorney files the requisite motion, the "'statutory maximum' for *Apprendi* purposes," see *Blakely*, 542 U.S. at 303, is life without parole. This sentence, then, is permitted "solely on the basis of the facts reflected in the jury verdict ...." *Id*. This type of sentencing scheme does not run afoul of *Apprendi* and its progeny.
>
> In this sense, the sentencing scheme imposed by MCL 769.25 is different from the schemes at issue in *Apprendi*, *Blakely*, *Booker*, and *Cunningham*—and that difference is of critical importance for purposes of the Sixth Amendment inquiry. In particular, we note that in *Apprendi*, 530 U.S. at 470, an enhanced sentence was possible if the prosecution filed a motion seeking such a sentence and after a hearing the trial judge found that the defendant acted with a biased purpose—which was a fact not encompassed by the jury's verdict. In this case, by contrast, MCL 769.25 allows the prosecuting attorney to file a motion to sentence up to the maximum that is allowed by the jury's verdict. The prosecuting attorney's motion in the instant case is not meant to trigger a factual finding that will increase the maximum sentence; instead, the motion is filed to initiate the Eighth Amendment protections demanded by *Miller*. *Hyatt*, at 15.

The *Apprendi* decision also noted that facts in aggravation of punishment are different than facts in mitigation. While facts that aggravate the punishment must be found by a jury beyond a reasonable doubt, facts in mitigation do not. *Apprendi*, at 490, n 16. MCL 769.25 does not contain any aggravating factor. At the time of

conviction, the highest sentence allowed by statute in life without parole. The *Miller* factors as set forth in MCL 769.25, and the sentencing hearing process, only serve to mitigate against a possible life without parole penalty.

***b. Ring v Arizona***

In *Ring v Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002), the United States Supreme Court found that where an Arizona statute permitted a trial judge to determine the presence or absence of aggravating factors to impose the death penalty, the defendant's Sixth Amendment rights were violated.

Under the Arizona scheme considered in *Ring*, a defendant convicted of first-degree murder cannot receive a death sentence unless a judge makes the factual determination that a specific, enumerated statutory aggravating factor exists. These specific factors include: 1) conviction of another offense for which a sentence of life imprisonment or death could be imposed; 2) conviction of a serious offense; 3) knowingly creating a grave risk of death to another in addition to the person murdered in the commission of the offense; 4) procurement of the commission of the offense by payment; 5) commission of the offense in exchange for anything of value; 6) commission of the offense in an especially heinous, cruel or depraved manner; 7) commission of the offense while in the custody or on release from incarceration; 8) prior commission of a homicide committed during the offense; 9) commission of an offense upon a person under fifteen years of age or over seventy years of age by an adult; and 10) the murdered person was a peace officer. *Ring*, at 593, n. 1. Without the critical finding of one of these ten facts, the maximum sentence to which the

defendant was exposed was life imprisonment, and not the death penalty. See *Ring*, at 596. A judge could sentence the defendant to death only after independently finding at least one aggravating circumstance. *Id.* at 592-593. The *Ring* Court concluded that "the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict. *Id.* at 604. Under *Ring*, the Sixth Amendment does not allow a judge, "sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609.

MCL 769.25 differs significantly from the statute in *Ring*. Arizona requires specific, enumerated findings, or the death penalty cannot be imposed. Michigan requires consideration of a multitude of aspects of the defendant and the crime. Michigan's system is distinguishable because no one particular fact, or any facts, are necessary to allow the imposition of life without parole. The life without parole sentencing option is within the statutory range of sentencing options available, so long as the considerations of *Miller* and MCL 769.25(6) are addressed.

The *Ring* decision required a jury finding because "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" and therefore must be found by a jury under the Sixth Amendment and *Apprendi*. *Ring*, at 604. The *Skinner* majority believes that "the findings mandated by MCL 769.25(6)" expose the defendant to a "greater punishment than that authorized by the jury's guilty verdict" and therefore are the "functional equivalent" of elements of a greater offense that *Ring* requires must be proven by a jury.

*Skinner*, at 37, citing *Ring* at 604. The *Skinner* majority erred in characterizing the considerations set forth in MCL 769.25(6) as mandated findings. The only mandate in MCL 769.25(6) is that the sentencing court consider factors. The considerations in MCL 769.25(6) are not "enumerated aggravating factors" and they do not constitute additional elements of the crime of first degree murder.

### *c. Blakely v Washington*

In *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the United States Supreme Court considered a sentencing scheme from Washington, where a sentencing reform act authorized, but did not require, an upward departure from the standard range upon a finding of "substantial and compelling reasons justifying an exceptional sentence." *Blakely*, at 299. This act provided a non-exhaustive list of aggravating factors that would justify such a departure. The Supreme Court held that for purposes of *Apprendi*, the "statutory maximum" is the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id*. at 303. The Supreme Court stated:

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment" and the judge exceeds his proper authority. *Id.* at 303–304.

The *Blakely* Court discussed the difference between the jury's finding of those facts essential to the lawful imposition of a penalty, and those facts involved in the judge's sentencing discretion:

> First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10–year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10–year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury. [*Id*. at 309.]

The *Skinner* majority cited this same part of the *Blakely* decision in concluding that juveniles are entitled to a term-of-years sentence, but this "entitlement" is unsupported. MCL 769.25 presents sentencing judges with the opportunity to consider mitigating circumstances associated with youth as *Miller* requires. It does not add an additional fact that must be found by a jury to unlock a potential sentence of life without parole. It is, compared to the situation discussed

in *Blakely*, more analogous to the burglary sentence range of 10 to 40 years. Based on the first degree murder conviction, a sentencing judge has the authority under MCL 769.25 to sentence to a term of years, or to life without parole. MCL 769.25 is unlike the other example in *Blakely* (10 year sentence with 30 years added for use of a gun), because it does not provide one sentence based on jury's verdict (a term of years sentence) and one greater (life without parole) only if some other fact is found. A juvenile committing first degree murder, even after MCL 769.25, commits that crime risking the possibility of a sentence of life without parole based on the jury's finding and no more.

***d. Cunningham v California***

In *Cunningham v California*, 549 US 270; 127 S Ct 856; 166 L Ed 2d 856 (2007), the United States Supreme Court considered California's determinate sentencing "triads," which provide a fixed lower, middle and upper penalty in a term of years. The California statute in question provided that the middle term of years shall be selected "unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." *Id*. at 278. The Court found that the middle term constitutes the relevant statutory maximum for the crime, since a sentencing court could not impose a term above the middle amount without additional fact finding. Because the statute authorized the judge, and not a jury, to make those findings to support an upper term sentence, the Court found the statute violated the Sixth Amendment. *Id*. at 293.

*Cunningham* does not support the majority's conclusion that a jury is required because the sentencing court in *Cunningham* "had no discretion to select a sentence within a range." *Id.* at 292. Rather, it was instructed to select the middle term unless it found facts allowing for the imposition of the upper or lower term. *Id.* MCL 769.25, unlike the statute in *Cunningham*, does not require the court to select a specific sentence in the absence of an additional finding. MCL 769.25 only requires that the court engage in consideration of the *Miller* factors before imposition of sentence, and allows for a sentence of life without parole, or a term between 25 and 40 years minimum and 60 years maximum. MCL 769.25(9).

***e. Hurst v Florida***

Following the decisions in both *Skinner* and *Hyatt*, the United States Supreme Court again considered the Sixth Amendment issue, relying on the *Ring* decision to invalidate Florida's sentencing procedure because it required a judge to find facts to impose a sentence of death. In *Hurst v Florida*, 577 US __; 136 S Ct 616; 193 L Ed 2d 504 (2016), the Court evaluated Florida's hybrid capital sentencing scheme which involves a two-step process where a jury first renders an advisory sentence of life or death without specifying any factual basis. Then, the court weighs aggravating and mitigating circumstances and enters a sentence. The court is required to set forth in writing its findings upon which the sentence is based. The court must give the jury recommendation "great weight," but the sentencing order must "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Hurst*, 136 S Ct at 622. In order

for the judge to impose a death sentence, "the court alone must find 'the facts … [t]hat sufficient aggravating circumstances exist and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Hurst*, 136 S Ct at 622.

The relevant difference between Florida's scheme in *Hurst* and MCL 769.25 is that under Florida law, the maximum sentence that a capital felon may receive on the basis of conviction alone is life imprisonment. In Michigan, a sentence of life imprisonment without parole is available based on the jury's verdict alone once a motion is filed seeking such a sentence. From the time of conviction, a life without parole sentence is always one of the options in the range of available sentences for a juvenile who commits first-degree murder under MCL 769.25.

**6. The practical complications of submitting the issue of imposing life without parole to a jury support the conclusion that neither *Miller*, nor the Michigan Legislature, intended that a jury make the decision.**

The *Skinner* majority required that the jury "make findings on the *Miller* factors as codified at MCL 769.25(6) to determine whether the juvenile's crime reflects 'irreparable corruption' beyond a reasonable doubt," but offered no guidance as to how a jury would actually make these findings or report them to the sentencing court. *Skinner*, at 58-59. The majority refers to the need for a jury finding of "irreparable corruption," but even the majority acknowledged that *Miller* did not establish a bright-line test to determine whether a juvenile's crime reflects irreparable corruption, and that a range of factors must be considered. *Skinner*, at

27, 49. It is unclear whether, under the *Skinner* majority's decision, a jury would simply render a decision as to whether a juvenile is "irreparably corrupt," or whether they would have to make a finding as to each of the factors set forth in MCL 769.25.

These difficulties demonstrate that the individualized sentencing envisioned by the *Miller* Court, and the Legislature in enacting MCL 769.25, was never one that involved a mandate of jury findings. Rather, it was a careful consideration of a non-exhaustive list of factors to arrive at the sentence that is carefully tailored to the individual juvenile, his or her life circumstances, and the nature of his or her crime. The *Skinner* majority's mandate that a jury be empaneled to impose such a sentence is incorrect, unsupported by precedent, and must be reversed.

## RELIEF REQUESTED

WHEREFORE, for the reasons stated above, the People request that this Court reverse the majority's decision in *Skinner* that a jury must be empaneled to determine whether a juvenile may be sentenced to life without parole under MCL 769.25. Further, the People request that this Court conclude that MCL 769.25, as applied by sentencing courts, does not violate the Defendant's Sixth Amendment rights. Finally, the People request that this Court affirm the Defendant's sentence of life without parole because the sentencing judge fully complied with MCL 769.25, as well as *Miller*, in imposing a sentence that is reasonable, individualized proportional to the Defendant and to her crimes.

Respectfully Submitted,

Michael D. Wendling
Prosecuting Attorney

By: */s/ HILARY B. GEORGIA*
Hilary B. Georgia (P66226)
Senior Assistant Prosecuting Attorney

Dated: March 21, 2017